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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STATE OF TEXAS, ET AL * 1:18-CV-068
* Houston, Texas
VS. *
* 1:36 p.m.
UNITED STATES OF AMERICA * October 8, 2019

MOTION HEARING

BEFORE THE HONORABLE ANDREW S. HANEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 THE COURT: All right. Be seated.

2 We're here in State of Texas, et al versus
3 U.S.A., et al.

4 Mr. Disher, you're here for the State.
5 Who else is there with you?

6 MR. DISHER: Yes, Your Honor. Todd Disher
7 for the State, and with me I have Adam Biggs, and Trent
8 Peroyea.

9 MR. BIGGS: Good afternoon, Your Honor.

10 MR. PEROEYA: Good afternoon, Your Honor.

11 THE COURT: Ms. Perales, you're here for the
12 defendant intervenors. Who else is with you?

13 MS. PERALES: Good afternoon, Your Honor.
14 In addition to me, Nina Perales, I have with me Mr. Ramon
15 Soto.

16 THE COURT: All right. And who is
17 representing the great State of New Jersey?

18 MR. MORAMARCO: I am, Your Honor, Glenn
19 Maramarco.

20 THE COURT: And, Mr. Hu, little table over
21 at the side.

22 MR. HU: Fine by me.

23 THE COURT: Let me start with what may be
24 the easy one. I have a motion to compel. Is that
25 resolved? Have we produced the documents? Do you have

1 them?

2 MR. DISHER: Your Honor, last Tuesday, we
3 essentially -- well, a week before that, we had agreed to
4 produce all of the responsive documents that Alabama and
5 Arkansas had, and then the last Tuesday we did indeed
6 produce those documents. So I can report to the Court
7 that based on their search, there's nothing else
8 responsive to produce to those requests.

9 THE COURT: Does that moot the motion, or do
10 you think there's something else there?

11 MS. PERALES: No, Your Honor. I mean, we
12 didn't receive what we asked for, but if the position of
13 the plaintiffs is that there is nothing more to produce,
14 then we're happy to withdraw the motion to compel.

15 THE COURT: All right. I'll just deny it as
16 moot. You don't have to file anything. I'll deny it as
17 moot.

18 MS. PERALES: Okay. Thank you.

19 THE COURT: Okay. So let's get to the real
20 business at hand, which is the great State of New Jersey's
21 motion to stay. Let me just talk for a minute. I mean,
22 there's no magic to this. And, quite frankly, you know,
23 if I could predict what the Supreme Court is going to do,
24 I'd probably quit this job and go to Vegas and, you know,
25 make some real money, but -- and I guess maybe I ought to

1 start with you, Mr. Moramarco, because it is your motion.
2 But what makes us think that the Supreme Court is going to
3 rule on anything that helps me? Let me be selfish for a
4 minute. What's going to help me?

5 MR. MORAMARCO: Sure, Your Honor. Would you
6 prefer I go there?

7 THE COURT: Why don't you come up here
8 because it's easier for the court reporter to hear. Not
9 this court reporter, any court reporter. His hearing is
10 fine.

11 MR. MORAMARCO: Sure, Your Honor.

12 Our position is that there is substantial
13 overlap between the issues that are before the Supreme
14 Court and the issues that are before this Court. If you
15 look at the way the case -- look at the way the case was
16 briefed before the Supreme Court, the United States has
17 raised two issues.

18 Really, the first one is whether or not
19 the recision is judicially reviewable under the APA. So
20 if the Court were to rule for the government there, this
21 case would essentially, presumably, might not be anything
22 left to decide here, because the recision -- if the
23 recision is valid, then whether or not the initial -- the
24 initial grant under DACA no longer is relevant. And
25 that's the reason that Texas came into this case.

1 But on the second question, the government
2 argues fairly strenuously that DACA is lawful and that
3 issue has been joined by all of the competing briefs as
4 well. The government spent five pages of its opening
5 brief on the argument that DACA is in fact lawful. I was
6 looking --

7 THE COURT: Really?

8 MR. MORAMARCO: I'm sorry. That DACA's
9 recision is lawful.

10 THE COURT: Okay. I was going to say.

11 MR. MORAMARCO: That DHS correctly concluded
12 that DACA was unlawful. So I think that that issue has
13 been joined by all the parties there, and that's one of
14 the -- that's certainly one of the issues that's been
15 briefed. I know that Ted Olson in the brief that he
16 filed, spent 11 pages on the argument that DACA is lawful.

17 So the issue clearly is one that the Court
18 may reach, but even if it doesn't reach that directly
19 because there are other ways the Court could end up
20 deciding this issue, I do think it will give -- it will
21 give some assistance to this Court.

22 I mean, I recall when a year ago, this
23 Court issued its preliminary injunction ruling, and it
24 certified potential questions the Fifth Circuit looking
25 for guidance on issues, and some of those issues are, in

1 fact, again briefed before the Supreme Court.

2 From Page 52 of the government's brief
3 before the Supreme Court, they argue that there's no
4 meaningful distinction between the lawfulness of DACA and
5 the lawfulness of the original DACA policy. That was one
6 of the issues that you certified to the Court and said
7 that there was a reasonable difference of opinion on that.

8 There's also the issue of whether or not
9 there is problematic discretion sufficient to make the
10 program valid, and you noted that "Regions and Vidal
11 Batalla" both found that, saying that reasonable minds
12 could differ on that.

13 So those are some of the issues that are
14 percolating before the Supreme Court. Now, we don't know
15 for sure that it's going to reach all of those, but there
16 is a good chance for potential if the government wins that
17 case, and we'll know I guess in about 6 to 8 months.

18 THE COURT: Is there anything that this
19 Court can do? I mean, obviously, I can rule. I mean, but
20 is there anything short of that, ruling on the merits,
21 that would, for lack of a better term, help tee up the
22 issue for the supremes to go ahead and decide it? I mean,
23 anybody given any thought to that?

24 MR. MORAMARCO: Well, I think briefing would
25 have been done in the Supreme Court. So I'm not sure that

1 they could react. I guess they could file a 28(j) sort of
2 letter to sort of inform the Court of what else has been
3 happening here. But the briefing in the Supreme Court
4 will obviously be done. But I guess one of the
5 questions --

6 THE COURT: Here's, I guess here's my --
7 here's my worry -- and, Mr. Disher, I'll let you weigh in
8 because I know you're opposed to this -- but here's my
9 worry about if I was to grant your motion. The obvious
10 worry is we wait eight months and nothing happens; or they
11 rule, but they don't say anything that helps resolve this
12 case. And what makes me worry about that is some of those
13 courts -- and I can't remember which ones because they
14 were four or five that ruled on the rescision of DACA --
15 some of them basically said: Well, no court has ever held
16 it to be illegal. Which is technically true. But, I
17 mean, so they dodge the issue. And, you know, I said: In
18 my order, on the legality part of it, based almost
19 entirely on the Fifth Circuit opinion that I have to
20 follow, said that given their opinion in DACA, it would
21 probably be the same in DACA.

22 Now, I denied the injunction for a number
23 of other reasons, but would I obviously love for the
24 Supreme Court to take this now, the answer is yes.

25 All right. Mr. Disher, weigh in. You

1 don't have to sit down. Just stay right there or feel
2 more comfortable sit in that first chair.

3 MR. DISHER: Thank you, Your Honor. So just
4 a few points in response to some of your questions.

5 There is very much a scenario here in
6 which the Supreme Court rules on the 2017 recision cases
7 before it, and never once addresses the legality of the
8 underlying 2012 memo, which is the heart of this case, of
9 course.

10 THE COURT: Right. That's what the courts
11 did of the opinion that they granted cert on.

12 MR. DISHER: Correct. And, so, I think
13 that, to Your Honor's point, there is very much a
14 possibility that if the stay is granted in this case,
15 we're now eight, nine, 12 months from now, and we still
16 don't have an opinion from the Supreme Court that really
17 helps this Court. And all we have done at that point is a
18 year and a half worth of litigation that has already
19 occurred, discovery is closed, the motions are fully
20 briefed, and we have an imminent setting on our motion for
21 summary judgment that is fully teed up.

22 Now, we would just be kicking that can
23 down the road, and there may not be anything to gain from
24 doing so. And then also to your point of if there's
25 anything else that this Court can do to help tee up the

1 issue before the Supreme Court -- now, I know that the
2 parties in that case hotly dispute the state of rationales
3 for the rescission, but the government's position is that
4 one of those reasons for pulling DACA down was because
5 they were worried about future litigation over the
6 legality of the 2012 memo.

7 That is very much what this case is about,
8 and the fact that this case now exists proves them right,
9 and if this case gets stayed in some way, I think that
10 perhaps maybe diminishes their argument. And if this
11 Court was to rule on the pending motion for summary
12 judgment, whether one way or the other, I think that that
13 would certainly go towards the federal government's
14 justification or stated rationale that one of the reasons
15 they rescinded DACA was a threat of future litigation.
16 That litigation is happening right now. So if that
17 litigation was to be stopped or even to be stayed in some
18 way, that perhaps reduces some of that rationale.

19 So I think that the continuing existence
20 of this case and a ruling from this Court would indeed
21 help the Court, the Supreme Court, in deciding the issues
22 in front of it.

23 THE COURT: Ms. Perales, do you want to
24 weigh in?

25 MS. PERALES: Thank you, Your Honor.

1 I think to some extent, the pending motion
2 from New Jersey interacts with our more recently filed
3 motion for stay at Docket Entry 432. And the basis for
4 our motion, which is actually a motion for leave to submit
5 supplemental briefing is that we have had seven more
6 months of discovery and development of the record since
7 briefing closed on the plaintiff's motion for summary
8 judgment. We have developed a great deal more evidence,
9 including expert testimony, lay witness testimony, answers
10 to interrogatories, production of documents.

11 THE COURT: What issues would they go to?

12 MS. PERALES: They go to both the issues
13 standing, as well as the issue of how DACA is implemented,
14 how it is carried out. And that's a very central issue
15 with respect to the merits. Even putting aside the
16 question of standing, which is very strongly joined in
17 this later part of the discovery.

18 THE COURT: Of course, the courts that have
19 ruled on the recision cases, I mean, basically, they
20 granted standing for anybody that had ever met a DACA
21 recipient. I mean, their rulings on standing are
22 incredibly broad. You don't have to comment on that.

23 But what would show that the State would
24 not have standing? And I just mean that hypothetically.
25 You don't have to quote evidence to me. But

1 hypothetically, if a state says, "I'm coming in and
2 representing my citizens, and I think my citizens are
3 getting the short end of the stick here," what would I
4 have to say that's not true?

5 MS. PERALES: I think there would have to be
6 some evidence that the citizens are getting the short end
7 of the stick. And what we have developed through further
8 development of the record, which was under the scheduling
9 order that the Court set out for us, is a great deal more
10 evidence touching on that, as well as how DACA's
11 implemented.

12 And I wanted to mention that we are still
13 waiting for the last of the discovery to come from the
14 federal government under the Court's order granting them
15 an extension until October 14th. We have additional
16 material. And the last time we were here with you, Your
17 Honor, we spoke about a review of records of actual DACA
18 recipients, and the federal government is concluding that
19 sample.

20 THE COURT: Let me ask -- Mr. Hu, you may
21 not be the one that can really address this, but the
22 government has filed pleadings that basically say this
23 discovery doesn't matter one way or the other because it
24 has to be decided on the record, the administrative
25 record.

1 Mr. Hu, do you feel qualified to join?

2 MR. HU: We don't believe there should be
3 any further discovery at this time. I mean, after summary
4 judgment stage, the Court has indicated there might be a
5 need for discovery.

6 THE COURT: Well, I'm considering the
7 fact -- and, I mean, we're just sitting here, we're on the
8 record obviously, but this is -- we're not arguing the
9 merits more than we're arguing procedure here. I mean,
10 I'm considering asking for briefing on that issue, on what
11 can I consider. Am I -- you know, because I think it's
12 been raised in some of these other cases, and I know --
13 I'm blank, Mr. Hu, on where it was raised by the
14 government. But they're basically saying the record was
15 the record when it got implemented, and that's all you can
16 consider.

17 MR. HU: That's correct. That's typically
18 how the APA review process works.

19 THE COURT: And, you know, that was not
20 argued in our prior case. And it wasn't argued, really,
21 in the beginning of this case. At least I don't remember
22 it being argued. Because if I'd been convinced of that, I
23 wouldn't have let any discovery go on because it all would
24 have been moot and a waste of time.

25 Now, I know the government, the state

1 government, the other government, their position has
2 always been that no discovery was necessary, but I think
3 your position was not -- and, Mr. Disher, you correct
4 me -- but your position was not what the United States
5 government's position is now, but if we're stuck on the
6 APA record, your position we can just win as a matter of
7 law. I mean, am I right about that?

8 MR. DISHER: You are, Your Honor. The legal
9 issues or, rather, the dispositive issues in this case are
10 purely legal issues. Those issues have been teed up as
11 early as the challenge to extend the DACA, and certainly
12 re-teed up in this case when we filed in May of 2018, as
13 well as when we filed our motion for summary judgment in
14 February of this year.

15 So those are legal issues which are in
16 fact dispositive to this entire case are fully briefed up
17 and they are fully in front of the Court and fully
18 developed, to the extent that the Court needs any
19 additional information.

20 MS. PERALES: And, of course, it's our
21 position, Your Honor, as defendant intervenors that, of
22 course, much of this is driven by the evidence that we've
23 developed since we filed our brief, and I believe briefing
24 closed sometime around February, we've had seven more
25 months of discovery.

1 THE COURT: What would be the difference --
2 and, again, I'm not -- I'm thinking out loud here more
3 than I'm asking. I'm really asking for advice from all
4 four of you -- between me staying the case, and me ruling,
5 and staying the effect of the ruling?

6 MR. DISHER: I think that one of the biggest
7 differences would be if you rule, that will, in essence,
8 go to -- and have, perhaps, some effect on the 2017
9 recision cases before the Court, because if you ruled, for
10 example, hypothetically, that DACA is in fact unlawful, I
11 think that will lend credence to the stated justification
12 under the 2017 recision memo, that part of the reason the
13 government was rescinding DACA was a fear that DACA was
14 going to be ruled unlawful.

15 Well, if that fear comes to fruition, then
16 that proves them right, which means that they're stated
17 justification can be anything but arbitrary and
18 capricious.

19 THE COURT: I guess my -- and I don't want
20 to steal the defendant's thunder here -- but if I was
21 going to answer that, I'd say, "Well, Judge, haven't you
22 already done that in your preliminary injunction hearing?"
23 I mean, you've said if you had to rule as a matter of law
24 on the likelihood of success on the merits, that Texas
25 would win.

1 Now, you know, but an injunction wasn't
2 granted because that's one of -- or two of the elements
3 they won were out of the other five, the other three they
4 lost, at least in my mind, in my ruling. So why -- I
5 mean, isn't that enough? I mean, isn't that enough to
6 signal to the supremes that, you know...

7 MR. DISHER: Well, Your Honor, couple of
8 things on that point. I think, first of all, if this
9 Court was to rule on the summary judgment, even if it
10 stayed the effect of its ruling, I imagine that the
11 parties would still be allowed to pursue appellate
12 remedies at that point. So the case would still be in
13 existence and it would still be progressing through the
14 legal channels.

15 So, again, the threat that the DOJ was
16 concerned about would still very much exist, as opposed if
17 this case was just definitely stayed, I think that that
18 lessens their argument. And, so, I think that a court --

19 And then my second point would be that
20 this Court, of course, ruled on a preliminary injunctive
21 basis, and I think we all recognize that the practical
22 effect of a final judgment on the merits is different than
23 a ruling on the preliminary injunction.

24 MS. SE CREST: Your Honor, it's our position
25 that if the Court were to rule now, it would be on a very

1 partial and undeveloped record. At the time that the
2 plaintiffs filed their motion for summary judgment, we had
3 essentially the preliminary injunction record. We did not
4 have more.

5 And what we have now is a soon-to-conclude
6 seven additional months of discovery that provide much
7 more of the record than what the Court had before. And we
8 would urge the Court to proceed in this case on this
9 case's sake, and not for the sake of any other case,
10 including the cases pending before the Supreme Court,
11 which will be submitted on November 12th during argument.

12 THE COURT: I understand that. I mean,
13 clearly the motion to stay and it was filed was based on
14 don't rule, please don't rule because the supremes may
15 take care of this for you, which is not an unappealing
16 argument for a judge.

17 Go ahead. Weigh in.

18 MR. MORAMARCO: Your Honor, yeah. I'd like
19 to weigh in on that. And I do think the way the Ninth
20 Circuit -- and I do want to emphasize, the Ninth Circuit
21 decision found that it was arbitrary and capricious, but
22 because the government concluded that DACA was unlawful,
23 that's the basis for their holding for -- and that's what
24 the Supreme Court is going to be revealing.

25 So I do think there's a decent chance that

1 the Court will reach that issue. And I don't see the
2 advantage. I've seen a lot of downsides to sort of the
3 DACA population if this Court were to issue a ruling that
4 puts more apprehension in their hearts about their future
5 when I think we all believe that, ultimately, the Supreme
6 Court is going to be the decisionmaker on this. It may
7 take longer to get there if it goes through this Court,
8 but the one part that I strenuously disagree with Texas
9 about is that there's really a downside to waiting here,
10 and I know this case has gone on for a long time. And
11 Your Honor knows that as well as anyone. But that's a
12 result, to a large extent, of Texas not bringing this case
13 against DACA years ago in the DACA litigation. They made
14 a strategic decision not to challenge DACA.

15 So when we're close to the Supreme Court
16 potentially resolving this issue, the downside risk of a
17 court getting it wrong and sending, you know, or having
18 these individuals live in fear again of what the future is
19 going to hold, perhaps precipitously, is significant. And
20 I do think, while this Court can weigh in on the issue and
21 it might be an advantage, we're getting closer to an
22 advisory opinion if there's not going to be any actual
23 remedy associated with that.

24 And I do think that was one of the
25 arguments, obviously, we made that it's hard for this

1 Court to really craft a remedy at this stage, given that
2 there are injunctions that are in existence that are
3 before the Supreme Court now if the Supreme Court is
4 allowed to continue.

5 So there's no real practical relief that
6 this Court -- at least our position -- can give to the
7 State of Texas and sister states. But I do think that
8 there isn't a huge upside to weighing in if the Supreme
9 Court is ultimately going to decide this. And the status
10 quo doesn't really hurt Texas, in our opinion.

11 THE COURT: Mr. Hu, you got a feeling?

12 MR. HU: We really take no position on, and
13 we do leave it to the discretion of the Court as to
14 whether to stay or not.

15 MR. DISHER: Your Honor, may I? I guess I
16 want to shift focus a little bit because we filed this
17 lawsuit as the plaintiff. Now, New Jersey, of course,
18 came in as an intervenor and they argue that there's no --
19 there's no upside to pursuing it. I think that that
20 actually flips the analysis on its head. We need to look
21 at what is the downside of continuing this case? I don't
22 think that there is a downside.

23 The lion's share of the work has been
24 done, discovery, the factor for discovery has closed, the
25 DOJ is going to produce one additional piece of

1 information that they have agreed to, I think next week.
2 And, again, we've had over 400 pages of briefing in this
3 case, over 30 depositions, thousands of pages of
4 production. And, really, there is no benefit to setting
5 this case.

6 There is, of course, a cost to us because
7 we've done all of this work, and now we are indefinitely
8 postponing based on a decision that may not help move the
9 ball forward in this case at all. But I really don't see
10 any benefit to staying this case, at this point, a year
11 and a half in, after we've all been traveling around the
12 country, doing depositions, expending the money that's
13 already been expended, to tee up to what are ultimately
14 legal issues that this Court is now ready to rule on.

15 THE COURT: Now, New Jersey has you beat on
16 that argument, because their brief points out, "Yeah, our
17 work is done, but the court is just beginning." That's
18 very persuasive argument.

19 All right. Here's what I'm going to do.
20 I'm not going to rule on the motion to stay, but I am
21 cancelling the October 28 hearing. But what I want on
22 October 28th, is for y'all to file a brief on what I can
23 consider. And I'm not ruling on your motion, Ms. Perales,
24 yet because it may be, you know, whether you want to file
25 additional stuff and want to do some additional things, if

1 I conclude, based on the briefing, that all I have is the
2 record about when it was enacted, then all of this
3 subsequent stuff is, you know, window dressing really. I
4 mean, I know the federal government has taken that place,
5 that position, state's taken that position, albeit for a
6 different reason. But what I really want to say, really
7 want y'all to focus on is the APA, is what can I consider
8 in whether this was lawfully enacted within the APA, and
9 am I stuck with whatever APA record is. That's
10 number one.

11 And then number two, what do I have with
12 the APA? Do I have anything? I mean, because this
13 issue -- and maybe it was raised a lot earlier and I
14 didn't really focus on it. But it's clearly the
15 government in the last couple briefs that had to do with
16 discovery, their position is, "Wait a minute. Time out.
17 All you get to consider is this. So why are we doing
18 discovery?"

19 So I would like y'all to each focus on
20 those two questions, number one, what can I consider; and,
21 number two, if all I can consider is the APA record, what
22 is the APA record, and what do I have of it, and where is
23 it in the file?" Because I'm not sure -- not that I --
24 you know, I don't focus, you know, until it's time for me
25 to rule on everything that you've attached and all that

1 kind of stuff, but do I actually have any of the APA
2 records?

3 And, so, I will then reset the hearing,
4 but probably before I reset the hearing, I'll take
5 Ms. Perales' motion based on what you guys convince me I
6 can look at. Will that delay things? Yes, it will. Will
7 it delay it long enough for the Supreme Court to rule?
8 Probably not.

9 MR. MORAMARCO: We may need some oral
10 argument, Your Honor.

11 THE COURT: And I'm not saying I might not
12 eventually grant your motion to stay, but I think in order
13 to rule on Ms. Perales' current motion, it's incumbent on
14 me to know what I can consider, because if all I can
15 consider is the APA record, then why waste anymore time
16 looking at discovery?

17 All right. Anything else we can resolve
18 today?

19 MR. DISHER: Not from the state.

20 MR. MORAMARCO: Nothing here, Your Honor.

21 THE COURT: All right. Thank y'all.

22 Off the record.

23 **(An off-the-record discussion was held)**

24

25

COURT REPORTER'S CERTIFICATE

I, Johnny C. Sanchez, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/
Johnny C. Sanchez, CRR, RMR

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